91-794

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HENRY HARPER, *et al.*,
Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), may under any circumstance be "applied" nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their federal annuities.

2. Whether the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111 prohibit a state from taxing pensions of military retirees while exempting from taxation the pensions of its own retired employees.

PARTIES TO THE PROCEEDING

Petitioners are 420 civil service and Armed Forces retirees (predominantly members of the Virginia Federation of Chapters of the National Association of Retired Federal Employees and the Military Retirees Taxpayers Association) who have paid state income tax on their federal annuities to the Commonwealth of Virginia. A list of the individual petitioners appears as Appendix E at 22a.

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IN THE

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No. ——

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VIRGINIA DEPARTMENT OF TAXATION

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Henry Harper and 420 named federal civil service and military retirees[1] hereby petition this Court for a writ of certiorari to the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (App. A at 1a-5a) is as yet unreported. This Court's order remanding this matter to the Supreme Court of Virginia (No. 90-1685, June 20, 1991, App. B at 6a) is reported at 111 S.Ct. 2883. The prior decision of the Supreme Court of Virginia (App. C at 7a-17a) is reported at 401 S.E.2d 868. The decision of the trial court, the Circuit Court for the City of Alexandria (App. D at 18a-21a) is unpublished.

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[1] A list of all individual petitioners is attached as Appendix E.

JURISDICTION

The Supreme Court of Virginia issued its opinion on remand from this Court affirming its denial of petitioners' entitlement to tax refunds on November 8, 1991. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

In *Harper* v. *Virginia Department of Taxation*, U.S. No. 90-1685, this Court vacated and remanded the decision of the court below refusing to grant petitioners tax refunds upon prospective only application of *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989). The Court directed that the Virginia Supreme Court reconsider its decision in light of *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991). After reconsideration in light of *Beam*, the court below affirmed its prior decision in all respects. Petitioners submit this second petition for certiorari seeking to reverse the Supreme Court of Virginia's erroneous denial of their entitlement to refunds of taxes collected in violation of 4 U.S.C. § 111 and the Supremacy Clause of the Constitution.

REASONS FOR GRANTING THE PETITION

This petition presents questions of substantial public importance concerning the propriety of states retaining taxes imposed in violation of the Constitution of the United States. This case arises as a sequel to this Court's remand order last Term in *Harper v. Virginia Department of Taxation*, No. 90-1685, 111 S.Ct. 2883 (1991). It presents the specific question whether this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), may be applied purely prospectively so as to deny tax refunds to federal retirees.

Prior to *Davis*, over twenty states employed income tax schemes that discriminated against federal retirees and in favor of retirees of state and local governments. Today, litigation continues in all but four of those states, and, in virtually all these cases the principal defense against payment of refunds is nonretroactive "application" of *Davis*. Notwithstanding this Court's decision last Term in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2338 (1991), and the remand orders in *Harper* and *Bass v. South Carolina*, 111 S.Ct. 2881 (1991), states continue to argue, and lower courts continue to hold, that *Davis* is not entitled to retroactive effect. Review by this Court is necessary to resolve finally the issue of the retroactivity of *Davis* and to stem the flow of confused misapplications of *Beam* in other contexts.

1. After this Court's decision in *Davis*, refund actions were initiated in all the states that had employed a discriminatory tax scheme similar to that employed by Michigan. To date, only four of those states have finally resolved these claims and begun paying refunds. First, in *Hackman v. Director of Revenue*, 771 S.W.2d 77 (Mo. banc. 1989), *cert. denied*, 110 S.Ct. 718 (1990), the Missouri Supreme Court declared that refunds were required as a matter of state law. After this Court's decisions in *McKesson v. Division of Alcoholic Beverages and Control*, 110 S.Ct. 2238 (1990), and *American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323 (1990), the State of New Mexico declined to appeal a trial court's finding of refund liability. *See Burns v. New Mexico*, No. SF 89-1314(c) (1st Jud. Dist. Santa Fe County, April 5, 1990). Michigan has begun paying refunds and, most recently, West Virginia has ordered the payment of refunds to federal civil service retirees. *See In Re Schirck*, No. 90-5201 RPD (Tax Comm'r of W. Va. Sept. 23, 1991).

Litigation in other states is ongoing. Reargument was heard in *Bass v. South Carolina* on October 30, 1991. In *Swanson v. North Carolina*, 407 S.E.2d 791 (N.C. 1991), *pet'n for reh'g pending*, a sharply divided court applied

Chevron[2] (notwithstanding *Beam*) to deny refunds. In Arkansas and Colorado, the state supreme courts held that refunds were due. *See Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991), *pet'n for cert. pend'g*, No. 91-375; *Kuhn v. Colorado*, 817 P.2d 101 (Colo. 1991). However, in neither state have refunds been paid: Arkansas' petition for certiorari is pending and the time for Colorado to file its petition has not yet expired.

On November 14, 1991, the Supreme Court of Montana affirmed the denial of refunds to federal retirees. *Sheehy v. Montana*, No. 90-540 (Mont. Nov. 14, 1991). In Oklahoma, Mississippi, and Utah, refund claims are pending on the merits in the state supreme courts.[3] In other states, refund claims are pending in intermediate state courts of appeals or still in the trial courts.[4] In still other states, the merits of the refund claims have yet to be reached.[5]

To date, this Court has disposed of four petitions for certiorari in *Davis*-related cases: *Hackman* (denying Missouri's petition), *Harper* (granting and vacating in light of *Beam*), *Bass* (same), and *McManus v. Iowa*, No. 90-1597 (denying retirees' challenge to federal court's 11th Amendment and Tax Injunction Act dismissal of their claims). Pending now are five other petitions: *Pledger v. Bosnick*, No. 91-375 (Arkansas' petition seeking relief from a decision of its highest court predicated on state law); *Nutbrown v. Munn*, No. 91-457 (challenging the requirement of exhaustion of administrative remedies to bring a *Davis* claim under 42 U.S.C.

[2] *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

[3] *See Strelecki v. Oklahoma Tax Commission*, No. 77615 (Ok. S.Ct.); *Winstead v. Marx*, No. 91-CC-0475 (Ms. S.Ct); *Brumley v. Utah State Tax Comm'n*, No. 910242 (Utah S.Ct).

[4] *See e.g. Duffy v. Wetzler*, No. 90-07800 (Supreme Court App. Div. 2d Dept.); *Born v. Waddell*, No. 1 CA-TX 90-029 (Ariz. Ct. App.); *Rinehart v. Sizemore*, No. 91-290 (Ala. Ct. of App.); *Ponthier v. Broussard*, No. 344,035 (19th Jud. Dist. Ct. La.).

[5] *See, e.g., Nutbrown v. Munn*, 811 P.2d 131 (Ore. 1991), *pet'n for cert. pend'g*, No. 91-457; *Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991), *pet'n for cert. pend'g*, No. 91-380.

§ 1983); *Hogan v. Musolf*, No. 91-380 (same); *Swanson v. Powers*, No. 91-666 (challenging the Fourth Circuit's determination that taxing officials in North Carolina are entitled to qualified immunity under 42 U.S.C. § 1983); *Barker v. Kansas*, No. 91-611 (questioning whether discrimination against military retirees violates 4 U.S.C. § 111). This petition directly poses the question that will eventually be central to all these and the remaining *Davis* cases: does *Beam* require that *Davis* must be applied retroactively? Until unmistakable guidance on this score is provided, this Court will continue to see petitions arising out of the various states affected by the *Davis* decision. Plenary review by this Court is warranted to resolve the divergent state court decisions of the federal question presented here and to forestall needless and repetitive litigation in this and the lower courts.

2. The lower court's reading of *Beam* as allowing for application of a *Chevron* analysis in this case is flawed in two fundamental respects. Following the lead of the *Swanson* court, the court below focused on Michigan's concession in *Davis* that refunds were the appropriate remedy for the invalidation of its tax. *See* 489 U.S. at 817. The court below held that, because the issue of entitlement to refunds was conceded rather than litigated and decided by this Court, the fact that refunds were ordered in *Davis* was not "precedent." *See* App. A at 4a; *Swanson*, 407 S.E.2d at 795. Accordingly, it reasoned, unlike the situation in *Bacchus*,[6] *Davis* did not apply its ruling to the parties before it. The court below thus determined that it was free to engage in a *Chevron* analysis to determine whether *Davis* should be applied retroactively and it affirmed its pre-*Beam* decision in its entirety. App. A at 5a.

The lower court's focus on Michigan's concession that refunds were the appropriate remedy for the invalidation of its tax is misplaced. As *Beam* emphasizes, the substantive question of the constitutionality of a tax and

[6] *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984).

the remedial question arising upon its invalidation are two distinct questions. 111 S.Ct. at 2443. In *Davis*, the Court held that Michigan's tax violated the Supremacy Clause and 4 U.S.C. § 111. 489 U.S. at 817. Self-evidently, had the Court not invalidated the tax, Michigan's concession would have been of no moment. Similarly, had the Court invalidated Michigan's tax, but not applied its decision to the parties before it, Michigan's concession would have been inconsequential. Michigan's concession only became operative upon the Court's invalidation of the tax *and* its determination to apply that decision to the parties before it.

To be sure, the issue of retroactivity was neither litigated nor even mentioned in *Davis*. But, whether "the prospectivity issue can . . . be said to have been litigated and by implication actually to have been decided by the [*Bacchus*] Court" was "unnecessary" to the holding in *Beam*. *Beam*, 111 S.Ct. at 2445 n.2. *See also id.* at 2448 White, J., concurring) ("even if . . . the Court was quite wrong in [applying its ruling to the parties before it], that is water over the dam, irretrievably"). *Davis* applies retroactively, for the overwhelming presumption is that the Court intends its ruling to apply to the parties before it. *Id.* at 2451 (O'Connor, J., dissenting) ("Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of [*Bacchus*' silence on retroactivity] is that the Court followed its customary practice.") *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilberson*, 111 S.Ct. 2773, 2787-88 (1991) (O'Connor, J., dissenting) (objecting to retroactive application of the rule announced and noting that the majority opinion did not even mention the issue of retroactivity).

Indisputably, the Court in *Davis* "did not reserve the question of whether its holding should be applied to the parties before it." 111 S.Ct. at 2445. Accordingly, *Davis* must "properly be understood to have followed the normal rule of retroactive application in civil cases." *Id.* Thus,

the court below erred in holding that the concession of refunds in *Davis* allowed it an escape from *Beam*'s command of retroactivity.

The court below's second error is even more insidious. The court misconstrued Justice Souter's comment that "[n]othing we say here deprives respondent of his opportunity to . . . demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided." 111 S.Ct. at 2448. The lower court interpreted this as sanctioning a *Chevron* analysis to deny relief even if *Davis* were retroactive. App. A at 5a. Thus, the court below has read *Beam* to overrule *McKesson*'s mandate of a clear and certain remedy for unconstitutional taxation.

As this Court held in *American Trucking Assn's v. Smith*, 110 S.Ct. at 2332,

> Our decision today in *McKesson* makes clear that once a State's tax statute is held invalid . . . the State is obligated to provide relief consistent with federal due process principles. When the State comes under such a constitutional obligation, *McKesson* establishes that equitable considerations play only the most limited role in delineating the scope of that relief.

Citations omitted. *See also id.* at 2334 ("*McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found.") By holding that *Chevron* applies even after a determination of unconstitutionality is made, the court below ignored both *McKesson* and *American Trucking Assn's v. Smith*. If followed, the decision below would hopelessly muddle the civil retroactivity jurisprudence this Court has so arduously striven to establish. Review by this Court is waranted to ensure that this encroachment upon *McKesson* is not allowed.

3. As a general rule, the lower federal court have had little difficulty applying *Beam*. Especially in the context

of determining the retroactive effect of *Lampf*, the federal courts almost uniformly have concluded that *Beam* requires *Lampf* to be applied retroactively. *See, e.g., Bourdeau v. Deloitte, Haskins & Sells*, 942 F.2d 497, 498 (8th Cir. 1991); *Welsh v. Cadre Capital*, —— F.2d —— (1991 WL 197100) (2d Cir. Oct. 7, 1991) (reversing its prior holding that application of new statutes of limitations would be prospective only).[7] In other contexts as well, the lower federal courts have applied *Beam* without apparent difficulty. *See Bethel v. American International Mfg. Corp.*, 768 F.Supp. 327, 329-30 (W.D. Okla. 1991) (reading *Beam* to require retroactive application of a state court decision (*Williams v. Hook*, 804 P.2d 1131, 1138 (Okla. 1990)) that reversed and remanded a dismissal for failure to state a claim).

In contrast, the state courts have had greater difficulty applying *Beam*. For example, in *Stroh Brewery Co. v. Director of the New Mexico Department of Alcoholic Beverage Control*, 816 P.2d 1090 (N.Mex. 1991), the Supreme Court of New Mexico utilized a *Chevron* analysis in refusing to retroactively apply *Healy v. Beer Institute*, 491 U.S. 324 (1989), (*"Healy II"*). The court concluded that *Beam* did not mandate retroactive application, finding "nothing in the *Healy II* opinion to indicate that the holding is to have retroactive effect," 816 P.2d at 1093, and finding an intent to make the decision nonretroactive in the Court's statement that *"Seagram*[8] is no longer good law." *Id.*, 816 P.2d at 1093. In *Healy II*, however, this Court affirmed the Second Circuit opinion, 491 U.S. at 343, which directed entry of judgment in favor of plaintiffs. *In re Beer Institute*, 849 F.2d 753, 761 (2d Cir. 1988). Accordingly, under *Beam*, the *Healy II* plaintiffs did obtain the benefit of the Court's ruling

[7] In *Glick v. Berk & Michaels, P.C.*, 1991 Westlaw 152614 (S.D.N.Y. Jul. 26, 1991), the district court refused to apply *Lampf* retroactively. This holding would not seem viable in light of *Cadre Capital*, however.

[8] *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966).

and, therefore, the *Stroh Brewery* court should have applied *Healy II* retroactively to the parties before it.[9]

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, *Davis* claimants are relegated exclusively to state courts to press their claims for refunds. But it is these courts that have demonstrated the greatest difficulty in applying *Beam*. This Court is the only federal court that can hear the retirees' claims; review by this Court is thus necessary to assure a correct and evenhanded application of *Beam* to all federal retirees.

4. This Court in *Beam* did not "speculate as to the bounds or propriety of pure prospectivity." 111 S.Ct. at 2448. If the court below is correct in its holding that *Davis* did not apply its holding to the parties before it and that therefore *Davis*' retroactivity is not determined under *Beam*, then this petition presents the questions left open in *Beam*: is "pure prospectivity" a viable jurisprudential doctrine, and, if so, is *Davis* appropriately applied prospectively only?

Petitioners submit that prospective decisionmaking is not a proper judicial function. Petitioners adopt the position taken by Justice Stevens in his dissent in *American Trucking Assn's v. Smith*, 110 S.Ct. at 2350, *i.e.*, that courts enjoy latitude in fashioning equitable remedies, but that in deciding substantive questions of law, they are bound "to determine the rights of litigants in accordance with [their] best current understanding of the law." Thus, *Chevron* analysis would be relevant only to determining, within constitutionally permissible bounds, an appropriate remedy.

Even if *Chevron* were an appropriate choice of law vehicle, however, *Davis* would nonetheless be entitled to

[9] In at least one other state court case the application of *Beam* has been uncertain. In *Devrnja v. West Virginia Board of Medicine*, 408 S.E.2d 346, 349 (W. Va. 1991), the court expressly shunned reliance on *Chevron, American Trucking Ass'ns* and *Beam*: "We decline to unravel this tangled federal scheme."

retroactive application. The threshold *Chevron* factor is the establishment of a new principle of law. *Chevron*, 404 U.S. at 106; *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982); *McKesson*, 110 S.Ct. at 2247 n.15. *Davis* does not satisfy this threshold test. In *Davis*, this Court applied the Public Salary Tax Act of 1939 (4 U.S.C. § 111) to the discriminatory taxation at issue, and found the state's disfavored treatment of federal retirees to be unlawful. 489 U.S. at 817. Any new principle of law implicated in *Davis* (if indeed there was one) was announced not by this Court in 1989 but by Congress in 1939. The holding in *Davis* is dispositive on this point:

> We have no difficulty concluding that civil service retirement benefits are deferred compensation for past years of service rendered to the government.
>
> • • • •
>
> [T]he overall meaning of § 111 is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of . . . retirement benefits . . ., except to the extent that such taxation discriminates on account of the source of compensation.
>
> • • • •
>
> Any other interpretation of the nondiscrimination clause [of 4 U.S.C. § 111] would be implausible at best.

Davis, 489 U.S. at 808-10, citations omitted. In light of the ease with which this Court reached its conclusions in *Davis*, and in light of that decision's precedential underpinnings, the contention that *Davis* could satisfy the threshold *Chevron* test is "implausible at best."

Moreover, the equities overwhelmingly favor retroactive application of *Davis*. The sole "equitable" argument for nonretroactive application of *Davis* is that refunds will prove costly to the states. Thus, the court below has held that because Virginia was strapped for cash, the law enacted by Congress in 1939 is inoperative and the taxes collected in violation of that law are not, in fact, unlawful. This is analytically as satisfying as a taxpayer asserting that because he has no money to pay the assessed tax, he owes no taxes. Indeed, it is even more perverse, for it suggests that the greater the magnitude of the constitutional violation, the greater the state's equitable claim not to rectify it.

Nor does this analysis explain why the meager state of the fisc at the time the refund claims are litigated would provide a basis for denying relief altogether. It would seem that if the state is truly unable to pay for its unconstitutional actions, then it should be required to pay what it can and to pay the remainder when it can. But not only is it counterintuitive to excuse the state altogether from liability because of its depleted coffers, it draws the courts well beyond their constitutional powers. It certainly is not a proper judicial function for courts to determine how much of a refund a state can afford to pay and, similarly, at what point a refund becomes so expensive that the underlying conduct must be deemed lawful.

In denying refunds under *Chevron* the court below incorporates this illogic. Petitioners submit that *Chevron* is inapposite to their claims. If *Chevron* is apt, then review by this Court is additionally necessary to address the unprincipled application of that analysis by the court below.

5. In the court below, the Commonwealth sought to distinguish between civil service retirees and retirees of the Armed Forces. The Commonwealth argued that because of the putative differences in the nature of civil service and military retirement, it could deny refunds to military retirees even if it were required to grant refunds to civil service retirees. That is, the Commonwealth argued that it did not violate 4 U.S.C. § 111 by taxing military pensions while exempting state pensions.

This identical issue is presently before the Court in the petition for certiorari in *Barker v. Kansas*, No. 91-611. In *Barker v. Kansas*, 815 P.2d 46 (Kan. 1991), the court

held that Kansas' taxation of military retirees and concomitant exemption of state and federal civil service retirees did not violate 4 U.S.C. § 111 because there were purportedly "significant differences" between the classes. This is the identical argument pressed by the Commonwealth in the courts below.

Without repeating the points made by the petitioners in *Barker*, and the Solicitor General and The Retired Officers Association as *amicus*, petitioners submit that this issue presents an independent ground necessitating plenary review by the Court. Virginia has not and does not distinguish betwen federal civilian retirees and federal military retirees in any of its tax laws. Accordingly, Virginia's attempt to distinguish between these classes of retirees is not anchored in "significant differences" recognized by its legislature. Thus, Virginia's proposed discrimination cannot pass muster under the "significant difference" test reiterated in *Davis*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Virginia should be granted.

Respectfully submitted,

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November 15, 1991

APPENDICES

APPENDIX A

SUPREME COURT OF VIRGINIA

Record No. 900770

Present: All the Justices

HENRY HARPER, *et al.*

v.

VIRGINIA DEPARTMENT OF TAXATION

Record No. 900792

LAWRENCE E. LEWY, *et al.*

v.

VIRGINIA DEPARTMENT OF TAXATION

On Remand from the Supreme Court of
the United States

OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.

November 8, 1991

These cases are before us again, having been remanded for our further consideration from the Supreme Court of the United States.

In *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803 (1989), the Supreme Court decided that state taxation of pension income of retired federal government employees, while exempting from taxation pension income of retired state government employees, violated the doctrine of intergovernmental tax immunity embodied in the supremacy clause of the Constitution of the United States. The appellants in the present case (collectively, Harper) filed suits for tax refunds pursuant to Code § 58.1-1826, claiming that the Commonwealth unconstitutionally taxed their federal retirement incomes and that state law requires the refund of those taxes collected during the three-year period preceding the *Davis* decision.

On March 1, 1991, we held that the *Davis* decision is not to be applied retroactively, and accordingly, Harper was not entitled to a refund. *Harper* v. *Virginia Department of Taxation*, 241 Va. 232, 401 S.E.2d 868 (1991). In so doing, we applied the three-pronged test announced in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). On June 28, 1991, the Supreme Court vacated our March 1, 1991 decision and remanded these cases to us "for further consideration in light of *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. ——, 111 S.Ct. 2439 (1991)."

The Georgia taxing statute at issue in *Beam* imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from products grown in Georgia. After the decision in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), in which the Supreme Court held that a Hawaii taxing statute that distinguished between alcoholic products imported from other states and locally manufactured alcoholic products violated the commerce clause of the Federal Constitution, James B. Beam Distilling Company, a Delaware corporation and Kentucky bourbon manufacturer, brought suit in a Georgia trial court, claiming that the Georgia statute likewise was violative of the commerce clause. The distilling company sought a full refund of the taxes paid for the taxable years 1982, 1983, and 1984. Relying upon *Bacchus*, the Supreme Court of Georgia held that the Georgia statute was unconstitutional. The Georgia court, however, refused to apply its ruling retroactively, thereby denying the requested refund. In so doing, the court applied the *Chevron Oil* test. *Beam*, 501 U.S. at ——, 111 S.Ct. at 2442.

The question presented in *Beam* was whether the new rule of law announced in *Bacchus* "should apply retroactively to claims arising on facts antedating that decision." *Id.* at ——, 111 S.Ct. at 2441. The Supreme Court reversed the Georgia court's judgment and remanded the case for further proceedings. *Id.* at ——, 111 S.Ct. at 2448.

The plurality opinion in *Beam* was authored by Justice Souter and joined by Justice Stevens. Justice Souter concluded that *Beam* involved retroactivity as a choice-of-law issue rather than as a remedial issue. *Id.* at ——, 111 S.Ct. at 2443. Justice Souter then set forth three possible solutions to the choice-of-law problem. First, a decision announcing a new rule of law may be made fully retroactive by applying the new rule both to the parties before the court and to all others by and against whom claims are made without regard to when such claims arise. Second, such a decision may be made purely prospective by applying the new rule of law only to cases arising on facts postdating the pronouncement. Third, the new rule could be applied to the parties before the court and the old rule could be applied to all other cases arising on facts predating the decision. *Id.* at ——, 111 S.Ct. at 2443-44. This third possibility, called "modified, or selective, prospectivity," was abandoned in the criminal context in *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). *Beam*, 501 U.S. at ——, 111 S.Ct. at 2444-45. Justice

Souter rejects this concept in the civil context. *Id.* at ——, 111 S.Ct. at 2447.

After concluding that the Supreme Court in *Bacchus* had applied its new rule to the litigants there before the court, Justice Souter stated the following:

> Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.

Id. at ——, 111 S.Ct. at 2446.

The present case, however, is distinguishable from *Beam*. Although the Supreme Court in *Bacchus* applied its rule retroactively to the litigants in that case, the Court made no such ruling in *Davis*. Indeed, the issue of retroactivity was not considered by the Supreme Court in *Davis* because Michigan previously had agreed to the payment of a refund to Davis if its taxing scheme were invalidated. 489 U.S. at 817.

In order for a case to be precedent for another case, the court in the first case must have decided the issue presented in the second case. *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952); *United States* v. *Mitchell*, 271 U.S. 9, 14 (1926); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925). Therefore, because the retroactivity issue was not decided in *Davis*, we are not foreclosed by precedent from applying the three-pronged *Chevron Oil* test in deciding the retroactivity issue in the present case.* *Accord Swanson* v. *North Carolina*, —— N.C. ——, ——, —— S.E.2d ——, —— (1991).

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* Furthermore, we do not read *Beam* as rejecting the *Chevron Oil* test. Four Justices clearly embrace the test's application in determining retroactivity. Two Justices reject the test, but only in its application to the choice-of-law issue. Only three Justices completely reject the test.

Moreover, as Justice Souter stated in Part IV of the plurality opinion, the grounds for the *Beam* decision are narrow. 501 U.S. at ——, 111 S.Ct. at 2448. "[The grounds] are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* at ——, 111 S.Ct. at 2448.

Beam is important not only for what it decided but also for what it did not decide. As Justice Souter wrote:

> We do not speculate as to the bounds or propriety of pure prospectivity.
>
> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court . . . . Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided . . . .

Id. at ——, 111 S.Ct. at 2448 (citations omitted).

Consequently, having reconsidered our March 1, 1991 decision in light of *Beam*, we conclude that nothing articulated in *Beam* requires a result different from that reached in our prior decision. Accordingly, we reaffirm our prior decision in all respects.

Affirmed.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D.C. 20543

June 28, 1991

Mr. Michael J. Kator
1275 K Street, N.W.
Suite 950
Washington, DC 20005-4006

Re: Henry Harper, et al.
v. Virginia Department of Taxation
No. 90-1685
Lawrence E. Lewy, et ux., et al.
v. Virginia Department of Taxation
No. 90-1772

Dear Mr. Kator:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Virginia for further consideration in light of James B. Beam Distilling Company v. Georgia, 501 U.S. —— (1991).

Very truly yours,

/s/ William K. Suter
WILLIAM K. SUTER
Clerk

APPENDIX C

SUPREME COURT OF VIRGINIA

Record No. 900770

HENRY HARPER, *et al.*

v.

VIRGINIA DEPARTMENT OF TAXATION

Record No. 900792

LAWRENCE E. LEWY, *et al.*

v.

VIRGINIA DEPARTMENT OF TAXATION

From the Circuit Court of the City of Alexandria
DONALD H. KENT, Judge

Present: Carrico, C.J., Compton, Stephenson, Whiting, Lacy, and Hassell, JJ., and Cochran, Retired Justice

OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.

March 1, 1991

In *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803 (1989), the Supreme Court of the United States declared that state taxation of pension income of retired federal government employees, while exempting from taxation pension income of retired state government employees, violated the doctrine of intergovernmental tax immunity embodied in the supremacy clause of the Constitution of the United States. The Supreme Court, however, did not decide whether its decision in *Davis* had retrospective application.[1]

In these consolidated appeals, the appellants (collectively, Harper) are retired federal employees who receive either civil service retirement benefits or military retired pay. They filed suits in the trial court against the Virginia Department of Taxation (the Commonwealth) in May 1989, seeking refunds, pursuant to Code § 58.1-1826, for state income taxes paid for tax years 1985, 1986, 1987, and 1988. After consolidating the several suits, the trial court ruled that *Davis* should be applied prospectively only and, therefore, that Harper was not entitled to the refunds. Harper appeals.

In this appeal, the principal issue is whether *Davis* should be applied only prospectively, thereby denying the refunds, or retroactively, thereby granting the refunds.

I

Whether a constitutional decision of the Supreme Court is applied retroactively is a matter of federal law. *American Trucking Associations, Inc.* v. *Smith*, —— U.S. ——, ——, 110 S.Ct. 2323, 2330 (1990). In the civil context, retroactive application of such decisions is governed by the three-pronged test announced in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). *Smith*, ——

[1] The Supreme Court did not consider this issue because Michigan conceded that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Davis*, 489 U.S. at 817.

U.S. at ——, 110 S.Ct. at 2331, *see U.S.* v. *Johnson*, 457 U.S. 537, 563 (1982).

In *Smith*, the Supreme Court considered a state's taxing statute that previously had been declared unconstitutional under the commerce clause of the Federal Constitution. —— U.S. at ——, 110 S.Ct. at 2329. The Court denied the claimant's request for a refund of taxes paid prior to an earlier decision that invalidated the taxing statute. *Id.* at ——, 110 S.Ct. at 2334. In so doing, a plurality of the Court employed the three-pronged *Chevron* test and concluded that its earlier decision should not be applied retroactively. The Court found that its earlier decision invalidating an Arkansas highway tax, *American Trucking Assns., Inc.* v. *Scheiner*, 483 U.S. 266 (1987), established a "new principle of law" under the commerce clause. *Id.* at ——, 110 S.Ct. at 2332. Arkansas's legislature, therefore, was justified in relying upon existing precedent and had "good reason to suppose" the enactment of the tax would not violate the Federal Constitution. *Id.* at ——, 110 S.Ct. at 2333.

Harper contends, nonetheless, that "because the taxes at issue here . . . constitute[d] an 'unconstitutional deprivation,' . . . Virginia must provide "backward-looking relief' to the refund claimants." Harper asserts that such relief is required by the holding in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, —— U.S. ——, 110 S.Ct. 2238 (1990).

In *McKesson*, decided on the same day as *Smith*, the Supreme Court held that a "clear and certain remedy," which could include refunds, was required to remedy Florida's unconstitutional liquor tax statute. —— U.S. at ——, 110 S.Ct. at 2252. In so holding, the Court rejected Florida's contention that its taxing authority implemented the tax preference scheme "'in good faith reliance on a presumptively valid statute.'" *Id.* at ——, 110 S.Ct. at 2254. In rejecting that contention, the Court

stated that the challenged tax statute "reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated" in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984). Thus, the Court concluded, Florida "[could] hardly claim surprise" when its later statute was invalidated. *Id.* at ——, 110 S.Ct. at 2255.

In the present case, nothing in the record suggests that the Commonwealth acted other than in good faith reliance upon a presumptively valid taxing statute. We conclude, pursuant to *Smith*, that the three-pronged *Chevron* test must be employed to determine whether the *Davis* decision should be applied prospectively only.

A

For a decision to be applied prospectively only, the first prong of the *Chevron* test requires that the decision "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. Satisfaction of this first prong usually has been stated as the "threshold test" for determining whether or not a decision should be applied prospectively only. *Johnson*, 457 U.S. at 550 n.12.

When *Davis* was decided, 23 states had statutes similar to the Michigan statute.[2] Virginia's statute had been in

[2] *See* Ala. Code Sections 36-27-28 and 40-18-19 (Supp. 1988); Ariz. Rev. Stat. Ann. Section 43-1022 (Supp. 1988); Ark. Code Ann. Section 25-51-3206; Colo. Rev. Stat. Section 39-22-104(4)(f) and (g) (Supp. 1988); Ga. Code Ann. Section 48-7-27(a)(4)(A) (Supp. 1988); Iowa Code Ann. Section 97A.12 (West 1984); Kan. Stat. Ann. Section 74-4923(b) (1985); Ky. Rev. Stat. Ann. Section 16.690 (Michie/Bobbs-Merrill Supp. 1988); La. Rev. Stat. Ann. 47:44.1 (Supp. 1989); Mich. Comp. Laws Ann. Section 206.30 (1988); Miss. Code Ann. Section 25-11-129 (1972); Mo. Rev. Stat. Section 86.190 and 104.540 (1986); Mont. Code Ann. Section 15-30-111(2) (1987); N.M. Stat. Ann. Section 10-11-145 (1978); N.Y. Tax Law Section 612(c)(3) McKinney (1987); N.C. Gen. Stat. Section 135-9 (1988); Okla. Stat. tit. 68 § 2358 (1988); Ore. Rev. Stat. Section 316.680(1)(c) and (d) (1987); S.C. Code Section 12-7-435(a), (d), and (e) (Supp. 1988); Utah Code Ann. Section 49-1-608 (1989); Va. Code Section 58.1-322(C)(3) (Supp. 1988); W.Va. Code Section 11-21-12(c)(5) and (6) (Supp. 1988); Wis. Stat. Section 71.05(1)(a) (Supp. 1988).

effect for almost half a century. *See* Acts 1942, c. 325. As far as the record shows, the federal pensioners had paid the tax without protest. Not a single federal pensioner had brought an action during that period in a Virginia court seeking a refund of taxes on the basis of the intergovernment tax immunity doctrine. The absence of such litigation reasonably may be explained by examining the doctrine's origin and development.

The intergovernmental tax immunity doctrine had its genesis in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The doctrine was grounded on the proposition that "[s]tates have no power, by taxation or otherwise, to retard, impede, burden or in any other manner control, the operations [of the federal government]." *Id.* at 436.

The pre-*Davis* cases invalidating state taxing statutes were decided on the proposition that the tax had a foreseeable and direct effect on some operation of the federal government. *See, e.g., Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983) (state tax that imposes greater burden on holders of federal obligations than on holders of similar state obligations impermissibly discriminates against securities issued by federal government); *Phillips Chemical Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960) (state tax that imposes greater burden on lessees of federal property than on lessees of other exempt public property impermissibly discriminates against federal government). Indeed, *Davis* states that intergovernmental tax immunity is based on "the need to

protect each sovereign's governmental operations from undue interference by the other." 489 U.S. at 814.

In the present case, it is difficult to discern how the General Assembly of Virginia should have been expected to perceive that a statutory scheme, exempting state pensioners from state taxation, would have placed any foreseeable and direct burden on some federal operation. Consequently, we conclude that the *Davis* decision established a new rule of law by deciding an issue of first impression whose resolution was not clearly foreshadowed. Thus, the first prong of the *Chevron* test is satisfied.

B

The second *Chevron* prong requires a court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. at 106-07. In applying this factor, we must determine whether the intergovernmental tax immunity doctrine will be retarded or furthered by retroactive application of the *Davis* decision.

The purpose of intergovernmental tax immunity is not to prevent legitimate state taxation. *See Smith*, —— U.S. at ——, 110 S.Ct. at 2332. Virginia's taxing statute was legitimate until a new rule was announced in *Davis*. As soon as the General Assembly became aware of the *Davis* decision, it acted to correct the defects in its statute. *See* Acts 1989, Special Session II, c. 3. As a result, the purpose of the intergovernmental tax immunity doctrine already has been fully served, and applying *Davis* retroactively would do nothing either to retard or to further the doctrine's purpose. Therefore, the second prong of the *Chevron* test is satisfied.

C

The third prong of the *Chevron* test requires a court to "[weigh] the inequity imposed by retroactive application." 404 U.S. at 107. In weighing the equities, con-

siderable deference must be accorded a state's reliance upon a statute that was presumptively valid. *See Lemon* v. *Kurtzman*, 411 U.S. 192 (1973). Indeed, "[i]t is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." *Id.* at 203. As Chief Justice Burger so aptly stated in *Lemon*, "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Id.* at 199.

An important equitable consideration is the effect that retroactive application of a judicial decision may have on a state's financial stability. As the *Smith* plurality acknowledged, applying a judicial decision retroactively may "have potentially disruptive consequences for the State and its citizens. A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State's current operations and future plans." —— U.S. at ——, 110 S.Ct. at 2333.

In *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1105 (1983), the Supreme Court held that the State of Arizona's voluntary pension plan violated Title VII of the Civil Rights Act of 1964. The Court further held, however, that the state's liability would be prospective only. *Id.* The Court found that retroactive liability could cost the state hundreds of millions of dollars. As Justice Powell stated, "[i]mposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits." *Id.* at 1106-07. Because the illegality of Arizona's actions had not been declared until *Norris* was decided, Justice Powell further stated that "[t]here is no justification for this Court . . . to impose this magnitude of burden retroactively on the public." *Id.* at 1107.

In the present case, the record discloses that retroactive application of the *Davis* decision would give rise

to a potential tax refund liability, inclusive of interest, of approximately $440,000,000. This liability would come at a time when the Commonwealth is already struggling to meet enormous fiscal deficits. The record contains affidavits of Commonwealth officials that support the conclusion that allowing the requested refunds would have a potentially disruptive and destructive impact on the Commonwealth's planning, budgeting, and delivery of essential state services.

Harper contends, nonetheless, that "it is simply more equitable to place the financial consequences . . . upon the government (and thus the whole body of taxpayers) than upon a small subclass of taxpayers who had unconstitutionally been forced to pay the tax in the first instance." Thus, Harper asserts, "taxpayers who have been paying more than their lawful share of taxes should be reimbursed by those who have paid less."

The Commonwealth counters by pointing out that "hundreds of thousands of other Virginia taxpayers have paid taxes on their private pension income but have no claim for monetary relief." The Commonwealth further asserts that "over 2.5 million Virginians annually have paid their 'fair share' of taxes while only some sixty thousand state and local retirees were excluded from pension income taxation."

The record supports the Commonwealth's assertions, and we conclude that, on balance, the equities weigh heavily in favor of the Commonwealth. Consequently, the third prong of the *Chevron* test is satisfied.

Accordingly, we hold that, under the *Chevron* test, the *Davis* decision is not to be applied retroactively. *Accord Bass* v. *State*, 395 S.E.2d 171 (S.C. 1990).

II

Harper contends, nonetheless, that the refunds are due as a matter of state law. He relies upon Code §§ 58.1-1825 and -1826. Code § 58.1-1825 provides that "[a]ny

person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment may . . . within three years from the date such assessment is made, apply to a circuit court for relief." Code § 58.1-1826 provides, in pertinent part, as follows:

> If the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order that the assessment be corrected. If the assessment exceeds the proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the court shall order that the applicant pay the proper taxes and to this end the court shall be clothed with all the powers and duties of the authority which made the assessment complained of as of the time when such assessment was made and all the powers and duties conferred by law upon such authority between the time such assessment was made and the time such application is heard. The court may order that any amount which has been improperly collected be refunded to such applicant.

Harper asserts that, even if the *Davis* decision applies prospectively only, the federal retirees are entitled to refunds under Code § 58.1-1826. Harper argues that, because the assessments are unconstitutional, they also are "erroneous or improper."

We reject this argument. We hold that, because the *Davis* decision is not to be applied retroactively, the pre-*Davis* assessments were neither erroneous nor improper within the meaning of Code § 58.1-1826.

Harper's state-law contention also fails for another reason. We previously have held that this Court's ruling declaring a taxing scheme unconstitutional is to be applied prospectively only. *Perkins* v. *Albemarle County*, 214 Va.

240, 198 S.E.2d 626, *aff'd and modified on rehearing*, 214 Va. 416, 200 S.E.2d 566 (1973).[3] We adhere to our holding in *Perkins*. In so dong, we follow the criteria stated in *Fountain* v. *Fountain*, 214 Va. 347, 348, 200 S.E.2d 513, 514 (1973), *cert. denied*, 416 U.S. 939 (1974), that "consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule." *See also Quick* v. *Harris*, 214 Va. 632, 634, 202 S.E.2d 869, 871 (1974), *cert. denied*, 420 U.S. 907 (1975).

III

Finally, Harper contends that "even if *Davis* were applied prospectively only, refunds for 1988 taxes would nonetheless be due, for they were not assessed, and in many cases were not paid, until *after Davis* was decided." (Emphasis in original.) *Davis* was decided on March 28, 1989. The last day for filing individual income tax returns for the 1988 taxable year was May 1, 1989. Harper claims that the last day for filing income tax returns is the date on which income taxes are assessed for the preceding year.[4] We do not agree.

[3] The case of *Capehart* v. *City of Chesapeake*, No. 5459 (Circuit Court, City of Chesapeake, decided Oct. 16, 1974), followed *Perkins*. In *Capehart*, more than one hundred taxpayers in the City of Chesapeake, who had been subjected to the same practice that was invalidated in *Perkins*, brought suit in circuit court seeking, among other things, refunds of the taxes "illegally and unconstitutionally assessed." The City demurred, citing *Perkins*. The circuit court sustained the demurrer, being of opinion that the case was controlled by *Perkins*. We denied Capehart's petition for appeal, 215 Va. xlvii, and Capehart's petition for certiorari raising due process grounds was denied by the Supreme Court, 423 U.S. 875 (1975).

[4] Harper's reliance upon Code § 58.1-1829 is misplaced. Section 58.1-1829 defines "assessment" as that term is used in Article 2 of Chapter 18, which establishes limitation periods for various forms of relief. Individual income tax liability is established in Article 2 of Chapter 3.

Income taxes are "imposed on the Virginia taxable income *for each taxable year* of every individual." Code § 58.1-320. (Emphasis added.) The taxable year ended on December 31, 1988, almost three months before *Davis* was decided. When the year ended, the 1988 tax was fixed and ascertainable. Only payment of the tax was delayed until May 1, 1989. Code § 58.1-341.

The Supreme Court rejected a similar contention in *Smith*. The Court reasoned that tax liability depends upon the "'occurrence of the taxed transaction or the enjoyment of the taxed benefit, not the remittance of the tax.'" *Smith*, —— U.S. at ——, 110 S.Ct. at 2335. As Justice O'Connor observed,

> [a] contrary rule would give States a perverse incentive to collect taxes far in advance of the occurrence of the taxable transaction. It would also penalize States that do not immediately collect taxes, but nevertheless plan their operations on the assumption that they will ultimately collect taxes that have accrued.

Id. at 2336.[5]

In sum, we hold that, (1) under the *Chevron* test, the *Davis* decision is not to be applied retroactively, (2) state law does not require tax refunds, but to the contrary, grants prospective-only application to decisions that invalidate a taxing scheme, and (3) our denial of refunds includes taxes due for the tax year 1988. Accordingly, the trial court's judgment will be affirmed.

Record No. 900770—*Affirmed*,

Record No. 900792—*Affirmed*.

[5] For the same reason, we reject the contention in *Lowe* (Record No. 900792) that the trial court erred in denying injunctive relief that would have barred the Commonwealth from filing any action to collect taxes from those who, after the *Davis* decision, had refused to pay the 1988 taxes.

APPENDIX D

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

Law No. CL891080

HENRY HARPER, *et al.*,
Plaintiffs,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Defendant;

Law No. CL890462

JOHN and FRANCIS MORRIS,
Plaintiffs,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Defendant;

Law No. CL890463

GEORGE and HELEN RABIL,
Plaintiffs,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Defendant;

Law No. CL891079

LAWRENCE and MIRIAM LEWY, *et al.*,
Plaintiffs,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Defendant;

Law No. CL891081

RAYMOND S. WEBSTER, *et al.*,
Plaintiffs,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Defendant.

ORDER

These five tax refund actions filed under Va. Code § 58.1-1825 and § 58.1-1826 against the Virginia Department of Taxation were heard and decided together upon the suggestion of the parties. The matter is presently before the Court on Cross-Motions for Summary Judgment filed by the defendant and the individual federal retiree plaintiffs in each case, the parties having agreed there are no material facts which are genuinely in dispute. Upon consideration of the pleadings and memoranda submitted by the parties, the affidavits filed by the plaintiffs and defendant and made part of the record by agreement of the parties, and the oral arguments heard by the Court on February 2, 1990, the Court, in accordance with its letter opinion dated February 12, 1990, rules as follows:

In each of these cases, the Court finds that the taxes challenged by plaintiffs were imposed under a valid stat-

ute which was not called into question until the United States Supreme Court decided *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500 (1989). The question before this Court is whether this is an appropriate case for prospective application of an unprecedented judicial decision. The determination of the retroactivity of judicial decisions is governed by the factors set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971):

- *Davis* decided an issue of first impression whose resolution was not clearly foreshadowed;
- prospective application of *Davis* will not retard its operation; and
- retroactive application would result in inequity, injustice and hardship.

It is clear to the Court that all of these factors are met in the present case, and that the *Davis* decision does not apply retroactively. This being so, the Court holds that:

- the taxes complained of were not erroneous or improper;
- plaintiffs therefore are not entitled to the requested refunds for taxable years 1985 through 1988.

Accordingly, it is hereby ORDERED that defendant's Motion for Summary Judgment is GRANTED, and plaintiffs' Motions for Partial Summary Judgment are DENIED. The provisions of Rule 1:13 shall be dispensed with except as to Michael J. Kator, Esquire, admitted *pro hac vice* in these proceedings as counsel for all plaintiffs, and local counsel George J. Rabil, Esquire. The Clerk of this Court is directed to reflect in the record in each of these cases that judgment is entered in favor of the defendant; and to mail an attested copy of this Order to all counsel of record.

Entered this 12th day of March, 1990.

/s/ Donald H. Kent
DONALD H. KENT
Judge

Seen and agreed to:

/s/ Gail Starling Marshall
GAIL STARLING MARSHALL
Deputy Attorney General

BARBARA M. ROSE
Senior Assistant Attorney General

GREGORY E. LUCYK
Assistant Attorney General

Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219

Counsel for Defendant
Virginia Department of Taxation

Seen and objected and excepted to:

/s/ Michael J. Kator
MICHAEL J. KATOR, Esquire
Kator, Scott & Heller
1275 K Street, N.W.
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Washington, D.C. 20005

Counsel for Plaintiffs

/s/ George J. Rabil
GEORGE J. RABIL, Esquire
5321 Truman Avenue
Alexandria, Virginia 22304

Local Counsel for Plaintiffs

APPENDIX E

Pursuant to Supreme Court Rule 14(a), set forth below is a complete list of petitioners.

Henry Harper
Vincent R. Agnelli
W.P. Alexander
Eugene K. Allen
Jasper D. Alspaugh
Ralph E. Andrews
Ray and Eloise Appel
Mary S. Bailey
Edward B. Ballard
A. Jackson Barden
Raymond R. Barkalow
Philip Barsch
Raymond E. and
C. Louise Bauer
Rex W. Beasley, Jr.
Charles R. Beatty
Richard L. Bell
Alva O. Benson
George L. Beyer
R.J. Bishop
Harold G. Blodgett
Elwyn E. Bobbitt
Donald Boegehold
Fred Bone
Helen A. Boone
Herman Boschen, Jr.
Mack W. Bradley
John G. Brady
George Brinkmann
George K. Brite
Helen K. Brock
William H. Bryce
Glover N. Buck
Min Bunch
Y. Kirk Burch
Warren R. Burton, Sr.
Hal H. Bush
Mary C. Calhoun
Joseph Caretta, Jr.
Roy N. Carter, Sr.
Augustus Cartos
Josephine A. Clark
Mr. and Mrs.
Russell R.S. Clem
Paul Comisarow
Patrick J. Connolly
Joseph Connors
Mrs. Marian Canady Cooper
Raymond and Evelyn Copple
Charles F. Corns
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